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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FEB 28 2003

File: SRC-01-194-50055 Office: Texas Service Center Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

[redacted]

"Identifying data deleted to prevent clearly unwarranted invasion of personal privacy"

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as an importer and a retail sales company. It seeks to extend the beneficiary's period of temporary employment in the United States as its manager. The director denied the petition after determining that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity and denied the petition. The director also determined that the petitioning entity had not demonstrated that a qualifying parent, branch, affiliate or subsidiary relationship exists between the petitioning U.S. entity and a foreign organization.

On appeal, counsel asserts that the beneficiary "is working in an executive capacity" and that "there is a qualifying relationship between the Parent and Branch companies."

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

The United States petitioner was incorporated in 2000 and claims that it is a branch of the overseas company, Protechno Marketing Services, located in Bangladesh. The petitioner declares more than one employee. The petitioner seeks to extend the beneficiary's period of employment for three years at an annual salary of $40,000.

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily in a managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision-making; and
>
> iv. receives only general supervision or direction

> from higher level executives, the board of directors, or stockholders of the organization.

In a supplement to the petition, the petitioner stated that the beneficiary would be responsible for "implementing policies and objectives of parent company."

Pursuant to a notice dated July 28, 2001, the petitioner was requested to submit additional evidence to establish that the beneficiary "has been or will be acting as a manager or executive as defined by regulation." The petitioner responded by stating that "the beneficiary has been instrumental in establishing these small businesses and ensuring the smooth commencement of their business activities." The petitioner summarized the beneficiary's activities as follows:

> He has negotiated leases . . . and he has scouted locations for the establishment of additional businesses. He is in charge of any and all export activities, of all personnel relations, and of all policy development and implementation. He oversees the activities of all kiosks, and has hired the employees that currently staff those businesses. Thus he is working exclusively in a managerial/executive capacity.

The director determined that the petitioner had failed to demonstrate that the beneficiary was to be employed in a managerial or executive capacity and denied the petition. On appeal, the petitioner asserts that that the beneficiary "does not participate in the daily work of the retail outlets, but operates only on a general executive/management level."

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. The fact that an individual possesses an executive or managerial title and operates a small business does not establish *prima facie* eligibility for classification as a manager or executive within the meaning of section 101(a)(44)(A) and (B) of the Act. The Service must first look to the petitioner's description of the beneficiary's job duties and the evidence submitted in support of the claimed duties.

The record does not contain a comprehensive description of the beneficiary's actual duties which would establish that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The vague and general descriptions of his duties are not persuasive in meeting the standard of being primarily of a managerial or executive nature. Simply paraphrasing the statutory definitions of managerial and executive capacity is not sufficient to satisfy the burden of proof. The record does not establish that the beneficiary has managed the organization, or a department, subdivision, or

component of the company. The petitioner has not demonstrated that the beneficiary has been or will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties. Further, the record is not persuasive that the beneficiary actually functions at a senior level within an organizational hierarchy, other than in position title(s). Based on the insufficiency of the documentation furnished and the unresolved discrepancies in that documentation, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

The remaining issue in this proceeding is whether a qualifying relationship exists between the petitioning entity and a United States organization.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

> *Branch* means an operation division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and

controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

Affiliate means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In support of the initial petition, the petitioner provided its evidence of its incorporation in the state of California on February 22, 2000, and in the state of Georgia on November 9, 2000. The petitioner submitted a copy of its U.S. Corporation Income Tax Return (Form 1120) for the year 2000. This document indicates that the petitioning company is wholly-owned by [redacted].

In the director's Request for Evidence dated July 28, 2001, the petitioner was requested to "submit evidence of the relationship between the U.S. and foreign company." In response to the Service's request, the petitioner stated "To establish the regular, on-going business of acts of Protechno Marketing Services, we are submitting photographs of the company as it currently operates, including a photo of the current executive officer . . . We have also submitted a notarized list of the 31 current Protechno employees . . . We hope these documents also clarify any questions you have regarding the relationship between the U.S. and foreign company."

On appeal, the petitioner provided a copy of a stock certificate which indicates Protechno Marketing Services owns 40,000 shares of the petitioning company's stock and a copy of a corresponding Stock Transfer Ledger which lists no other stockholders. In addition, the petitioner provided an affidavit from Mahbubur Rahman who testified that he was the sole proprietor of Protechno Marketing Services. Counsel concluded that this evidence "will answer all questions . . . regarding the qualifying relationship between the U.S. and foreign companies."

Despite counsel's assertions, the record contains no evidence to demonstrate that the beneficiary seeks to enter the United States to render his services to a branch of the same employer or a parent, affiliate, or subsidiary thereof as required by 8 C.F.R. 214.2(l)(1)(ii).

The evidence submitted on appeal suggests that Protechno Marketing Services is the sole owner of the petitioning company. However, as noted above, the petitioning company's Corporate Income Tax Return for the year 2000 states that the company is wholly-owned by Mohammad Mansur. The petitioner has failed to provide any explanation of this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

It can only be concluded that no qualifying parent, branch, subsidiary or affiliate relationship has been shown to exist between the petitioning entity and a U.S. entity which will employ the beneficiary. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.